

Alliance Bank Malaysia Bhd v Si Leong Soon

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HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS NO
(MT-1)24-514 OF 2005

VERNON ONG JC

25 AUGUST 2008

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*Civil Procedure — Judgment — Res judicata — Senior assistant registrar's order
— Whether order was a final judgment on merits*

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*Land Law — Acquisition of land — Market value — Principles governing
valuation of land — Whether reserved price by SAR was a price equal to
estimated market value of land pursuant to s 257(1)(d) of the National Land
Code — National Land Code s 257(1)(d)*

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The defendant was the registered owner of a piece of land in Johor Bahru together with a double storey semi detached house in Taman Century ('the land') which was charged to the plaintiff. The plaintiff took out a summons for directions pursuant to an order for sale but the defendant was not present for the hearing. The senior assistant registrar ('SAR') fixed the reserved price of the land at RM420,000. The defendant filed for an order that the price be fixed at RM550,000 and tendered a valuation report which was dismissed by the SAR. Two issues emerged, ie a preliminary issue and a main issue. In the preliminary issue, the plaintiff stated that the defendant's application was an abuse of the process of court, as the defendant was granted time to file his valuation report but did not turn up for the hearing and had failed to file it. Also, the matter was res judicata. The defendant argued that as he was unable to obtain a report, there was a miscommunication on the solicitor's part with the court's staff, he had applied for an adjournment and that the matter was not res judicata as the SAR's order was not a final judgment on merits. The main issue was whether the reserved price of RM420,000 by the SAR was a price equal to the estimated market value of the land pursuant to para (d) in s 257(1) of the National Land Code ('NLC').

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Held, dismissing the application with costs:

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- (1) The plaintiff did not challenge or dispute the defendant's averment that his absence in court on that day was due to a miscommunication between the defendant's solicitor and the court's staff, thus it must be

- A taken as admitted by the plaintiff that on the day in question there was indeed a miscommunication and that the defendant could not be faulted for their absence. The preliminary objection on this point was without merit and was overruled. The court was of the view that the matter was not *res judicata* as the fixing of a reserved price was not a
- B judgment or final order in the sense that it determines the point in issue (see para 5).
- (2) In fixing a reserved price, the valuation reports of both parties ought to be scrutinised carefully by the court, and if one valuation report contains, as comparison, a schedule of recent sales of lands of similar character and land-use in the vicinity of the land to be sold, and the other report does not, the court may choose to accept the first report as the correct guide. However, in the exercise of the court's discretion in fixing the reserved price, the court has to hear the parties and take into consideration all relevant matters (see paras 6 & 8).
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- (3) On the facts, the plaintiff's valuation report was preferred because it satisfied the criteria stated. The estimate of the market value of the land contained in the plaintiff's valuation report was derived after adjustments were made to the comparable properties to reflect the market value of the property. The adjustments were made after a study of the respective characteristics, merits and demerits of each comparable property. In the premises, the SAR was correct in determining the estimated market value of the land at RM420,000 (see para 16).
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F **[Bahasa Malaysia summary]**

- Defendan merupakan pemilik berdaftar sebidang tanah di Johor Bahru bersama rumah dua tingkat separa kembar di Taman Century ('tanah tersebut') yang dicagarkan kepada plaintiff. Plaintiff memfailkan suatu saman untuk arahan berikutan dengan satu perintah jualan tetapi defendan tidak hadir pada hari pendengaran. Penolong Kanan Pendaftar ('PKP') menetapkan harga rizab tanah tersebut sebanyak RM420,000. Defendan memfailkan satu perintah memohon agar harga tersebut ditetapkan sebanyak RM550,000 dan mengemukakan laporan penilaian tetapi diketepikan oleh PKP. Dua isu berbangkit dalam kes ini, iaitu isu permulaan dan isu utama. Dalam isu permulaan, plaintiff menyatakan bahawa permohonan defendan merupakan suatu penyalahgunaan proses mahkamah, kerana defendan diberi masa untuk memfailkan laporan penilaiannya tetapi tidak hadir pada hari pendengaran dan gagal memfailkan laporan tersebut. Perkara itu juga dikatakan sebagai *res judicata*. Defendan pula berhujah, oleh sebab dia tidak memperoleh laporan tersebut, dan berlakunya salah faham komunikasi antara peguamnya dan kakitangan mahkamah, dia telah memohon suatu penangguhan dan perkara itu bukan suatu *res judicata* kerana perintah PKP
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tersebut bukanlah perintah muktamad berdasarkan merit. Isu utama pula ialah sama ada harga rizab RM420,000 yang diputuskan oleh PKP setara dengan anggaran harga pasaran tanah tersebut menurut perenggan (d) s 257(1) Kanun Tanah Negara.

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Diputuskan, menolak permohonan defendan dengan kos:

(1) Plaintiff tidak mencabar atau mempertikai penegasan defendan bahawa ketidakhadirannya di mahkamah pada hari tersebut disebabkan oleh salah faham komunikasi di antara peguam defendan dan kakitangan mahkamah, maka mahkamah beranggapan bahawa plaintiff mengakui wujudnya salah faham komunikasi pada hari tersebut dan defendan tidak boleh dipersalahkan atas ketidakhadirannya. Bantahan permulaan ini adalah tidak bermerit dan ditolak. Mahkamah berpendapat bahawa perkara ini bukan res judicata kerana penetapan harga rizab bukan penghakiman atau perintah muktamad yang memutuskan perkara pokok yang menjadi isu (lihat perenggan 5).

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(2) Dalam menetapkan harga rizab, laporan penilaian kedua-dua pihak perlu diteliti oleh mahkamah, dan jika dibandingkan, satu laporan mengandungi jadual harga jualan terkini tanah yang mempunyai ciri-ciri dan kegunaan tanah seakan-akan sama, yang kedudukannya berdekatan dengan tanah yang hendak dijual, dan laporan yang satu lagi tiada jadual harga terkini, mahkamah seharusnya menerima laporan yang pertama sebagai garis panduan. Namun, dalam menjalankan kuasa budi bicaranya menetapkan harga rizab, mahkamah perlu mendengar kedua-dua pihak dan mengambilkira semua perkara yang relevan (lihat perenggan 6 & 8).

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(3) Berdasarkan fakta, laporan penilaian plaintiff lebih memuaskan kerana memiliki ciri-ciri yang dinyatakan. Anggaran harga pasaran tanah tersebut ada dalam laporan penilaian plaintiff setelah beberapa penyesuaian dibuat ke atas beberapa hartanah yang boleh dibanding bagi menunjukkan harga pasaran hartanah tersebut. Penyesuaian dibuat setelah kajian dibuat berdasarkan ciri-ciri tertentu, merit dan demerit setiap hartanah yang boleh dibanding. PKP membuat keputusan yang betul apabila menetapkan RM420,000 sebagai anggaran harga pasaran tanah tersebut (lihat perenggan 16).]

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Notes

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For cases on market value, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1911–1939.

For cases on res judicata, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3937–3938.

A Cases referred to

NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd [1992] 2 MLJ 349 (folld)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35 (folld)

Pacific Bank Bhd, The v Chan Peng Leong [1998] 2 MLJ 613 (refd)

B**Legislation referred to**

National Land Code ss 257(1)(d), 259(2)

Rules of the High Court 1980 O 31 r 2(4)(c)

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Manian K Marappan (Manian K Marappan & Co) for the defendant.

Alvin Chang (Azean with him) (Iqbal Hakim Sia & Voo) for the plaintiff.

VERNON ONG JC:**D**

[1] This is the defendant's appeal to the judge in chambers against the decision of the learned deputy registrar given on 17 December 2007 dismissing the defendant's summons in chambers (encl 6).

E**BACKGROUND FACTS****F**

[2] The defendant is the registered owner of a piece of land held under Grn 72167 Lot No 15368 in the Township and District of Johor Bahru, Johor Darul Ta'zim together with a double-storey semi-detached house erected thereon identified as No 185, Jalan Dato Suleiman, Taman Century, 80250 Johor Bahru, Johor Darul Ta'zim ('the land') which was charged to the plaintiff. Pursuant to an order for sale the plaintiff took out a summons for directions which came up for hearing on 17 September 2007. The defendant was not present at the hearing of the summons for directions. After hearing

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of counsel for the plaintiff the learned senior assistant registrar fixed the reserved price of the land at RM420,000. Dissatisfied with the reserved price the defendant filed the summons in chambers for an order that the reserved price be fixed at RM550,000. In support of the said application the defendant tendered a valuation report dated 8 October 2007 (exh SLS-2 in

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encl 7) ('the defendant's valuation report'). The defendant's application was dismissed by the learned deputy registrar on 17 December 2007.

PRELIMINARY ISSUE**I**

[3] At the outset learned counsel for the plaintiff submitted that the defendant's application is an abuse of process of court. It was submitted that at the initial hearing of the summons for directions before the senior assistant registrar ('SAR'), the defendant was granted two weeks to file his valuation report. The defendant was not present at the subsequent hearing. The

defendant also failed to file his valuation report. Learned counsel for the plaintiff also submitted that the defendant's application is an abuse of process of court because the matter is *res judicata*.

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[4] In reply learned counsel for the defendant contended that the defendant was unable to obtain the valuation report within the stipulated time. He had written in to the court applying for an adjournment on 12 September 2007. He said that his absence in court on that day was due to a miscommunication between the defendant's solicitor and the court's staff. Learned counsel also contended that *res judicata* did not apply in this situation. The SAR's order fixing the reserved price is not a final judgment on merits (see *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613). The defendant's application is merely to vary the reserved price. This is an incidental and interlocutory application. At the time the SAR fixed the reserved price at RM420,000, the SAR only relied on the valuation report submitted by the plaintiff.

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[5] In regard to the first preliminary issue, the court notes that the plaintiff did not challenge or dispute the defendant's averment that his absence in court on that day was due to a miscommunication between the defendant's solicitor and the court's staff. In the circumstances it must be taken as admitted by the plaintiff that on the day in question there was indeed a miscommunication and that the defendant could not be faulted for their absence. The plaintiff's preliminary objection on this point is without merit and is overruled. In regard to the second preliminary issue that the matter is *res judicata*, the court is of the view that it is not. The fixing of a reserved price is not a judgment or final order in the sense that it determines the point in issue. In making the determination the valuation reports of both the plaintiff and the defendant ought to have been placed before the SAR. The SAR ought to have been given the opportunity to scrutinise the reports carefully, to hear both parties and to take into account all relevant matters. In the circumstances of the case the reserved price of RM420,000 was determined by the SAR without the benefit of the defendant's valuation report. Read together with s 257(1)(d) of the National Land Code ('NLC'), the fixing of reserved price under O 31 r 2(4)(c) of the Rules of the High Court 1980 is directory in nature. The SAR's fixing of the reserved price is not in the nature of final order or judgment. The plaintiff's preliminary objection on *res judicata* is also without basis. The court accordingly proceeded to hear the appeal.

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MAIN ISSUE

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[6] The main issue arising in this appeal is whether the reserved price of RM420,000 fixed by the SAR for the purpose of the sale is a price equal to

- A the estimated market value of the land pursuant to para (d) in s 257(1) of the NLC. The defendant's contention is that the reserved price of the land should be fixed at RM550,000. Learned counsel for the defendant submitted that RM550,000 is the market value of the land and placed reliance on the defendant's valuation report. On the other hand, learned counsel for the
- B plaintiff submitted that the reserved price of RM420,000 is the market value of the land and is based upon the plaintiff's valuation report prepared by Colliers, Jordan Lee & Jaafar (JH) Sdn Bhd ('the plaintiff's valuation report'). The determination of this issue turns on the principles governing: (1) the
- C fixing of a reserved price of the land for the purposes of the sale under s 257 of the NLC; and (2) the determination of the market value of the land.

- [7] In *NKM Properties Sdn Bhd v Rakyat First Merchant Bankers Bhd* [1992] 2 MLJ 349, the High Court had ordered that a piece of land charged to the
- D respondent be sold by public auction under the NLC. Eight auctions were held but they were not successful. The reserved price at the auction was RM4.63m. The respondent applied to the senior assistant registrar ('SAR') to fix a new reserved price and the next auction date. The respondent produced a valuation report which showed the estimated open market value of the land
- E to be RM5.7m and the estimated forced sale value to be RM4.02m. The SAR fixed the reserved price at RM5m. The appellant appealed to the judge in chambers who confirmed the order of the SAR. The appellant appealed to the Supreme Court. The respondent filed a cross-appeal. The principal issue before the Supreme Court concerned the interpretation of s 259(2) of the
- F NLC, namely, whether the reserved price for the subsequent auction, can be fixed higher than the reserved price of the last unsuccessful auction sale. The Supreme Court took the view that the law requires that the reserved price fixed for the next auction date cannot be above the reserved price for the last auction. Delivering the judgment of the Supreme Court Eusoff Chin SCJ
- G (as he then was) said at p 352:

- H It is necessary to determine the meaning of 'reserve price'. Section 257(1)(d) of the Code provides that the reserved price is a price equal to the estimated market value of the land in question. Market value means the price which a willing vendor may reasonably expect to obtain from a willing purchaser. The SAR is not an expert in land valuing, and he has to study the land valuation reports put before him. He may face great difficulty when the estimated market values of the land in the valuation reports put by the plaintiff and by the defendant differ greatly. In that case he has to scrutinise the reports carefully. *If, one report contains, as comparison,*
- I *a schedule of recent sales of lands of similar character and land-use in the vicinity of the land to be sold, and the other report does not, he may choose to accept the first report as the correct guide.* But he has to exercise his discretion in fixing the reserved price judiciously which means that he has to hear the parties, and take into consideration all matters which are relevant. In fixing the reserved price for the first auction sale under s 257(1)(d) of the Code he should not take the 'forced sale value' of the land

as the estimated market price because 'forced sale value' takes into account an element of compulsion to sell or to buy. (Emphasis added.)

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[8] It is accordingly settled that in fixing a reserved price the valuation reports of both parties ought to be scrutinised carefully by the court. And, if one valuation report contains, as comparison, a schedule of recent sales of lands of similar character and land-use in the vicinity of the land to be sold, and the other report does not, the court may choose to accept the first report as the correct guide. However, in the exercise of the court's discretion in fixing the reserved price that the court has to hear the parties, and take into consideration all relevant matters.

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[9] The main principles in determining the market price were enumerated by the Federal Court in *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35. In that case the Selangor State Government decided to acquire a piece of land comprising of 147 acres in Gombak owned by 14 co-proprietors in undivided shares. The Collector of Land Revenue held an enquiry and assessed the whole of the land in the sum of RM2,219,620 at RM15,000 per acre as compensation to be paid to the owners. The owners were dissatisfied and asked for the matter to be referred to court. The High Court with the aid of two assessors awarded the sum of RM2,413,125. At the same time the High Court divided the land into two parts. In respect of the first part the valuation of RM30,000 per acre valued by the appellant's valuer was accepted and in respect of the second part the valuation of the Collector's valuer at RM15,000 was accepted. The appellant appealed. The Federal Court held that the big area of the land in question, its location and nature do not render it easily marketable as with the smaller lots in the neighbourhood. In the result the Federal Court took the view that compensation in the sum of RM2,500,000 as the market value of the whole land as one unit is reasonable and proper. The Federal Court set aside the judgment of the High Court. Syed Agil Barakbah FJ delivering the judgment of the Federal Court had this to say at p 37:

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First, market value means the compensation that must be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The elements of unwillingness or sentimental value on the part of the vendor to part with the land and the urgent necessity of the purchaser to buy have to be disregarded and cannot be made a basis for increasing the market value. It must be treated on the willingness of both the vendor to sell and the purchaser to buy at the market price without any element of compulsion. Secondly, the market price can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and positions. Thirdly, its potentialities must be taken into account. The nature of the land and the use to which it is being put at the time of the acquisition have to be taken into account together with the likelihood to which it is reasonably capable of being put to use in the future e.g. the possibility of it being used for building or other

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- A** developments. Fourthly, in considering the nature of the land regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road to and within it or presence of a road reserve indicating a likelihood of access to be constructed in the near future, expenses that would likely be incurred in levelling the surface and the like. Fifthly, estimates of value by experts are undoubtedly some evidence but too much weight should not
- B** be given unless it is supported by, or coincides with, other evidence (see *Superintendent of Lands and Surveys, Sarawak v Aik Hoe & Co Ltd, Vyricherla Narayana Gajapatiraju v The Nanyang Manufacturing Co v Collector of Land Revenue Johore*).
- C** The safest guide is evidence of sales of similar lands of similar quality or position in the locality at or prior to the time of the acquisition. The prices paid for such sales can be used as comparables subject to making allowances for all the circumstances.
- D** [10] In short, the five main principles to be borne in mind in determining the market value of the land may be summarised as follows:
- (i) Market value means the compensation determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser, absent any element of compulsion.
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- (ii) Market value can be measured by a consideration of the prices of sales of similar lands in the neighbourhood or locality and of similar quality and position.
- F** (iii) The potentialities of the land must be taken into account;
- (iv) In considering the nature of the land regard must be had to several factors including the location of the land, availability of access road to and within it and the like.
- G** (v) Too much weight should not be given to estimates of value by experts unless it is supported by other evidence.
- H** [11] Learned counsel for the defendant submitted that the reserved price ought to be fixed at RM550,000. In support of his contention learned counsel relied on the defendant's valuation report. The method of valuation adopted in the defendant's valuation report is the comparison method. This method of valuation involves the comparison of recent sales of similar properties in the area. The report also noted that comparable properties fetched a market price in the region of RM450,000 to RM580,000 per unit
- I** in 2003 and 2006. In this report four comparables were considered, all of which also related to a double-storey semi-detached house. The defendant's valuation report concluded with the remark that the market value of the land at RM550,000. It is pertinent to refer to the schedule of sales comparison contained in the defendant's valuation report which is as follows:

SCHEDULE OF SALES COMPARISON

No.	Lot/Title Nos	Location/ Addresses	Land Area (Sq.ft)	Date of Transaction	Price (RM)	Analysis (RM/Psf)	Remarks
1.	LOT 8676	Taman Century	3,640	14/11/2005	380,000	130.25	Double Storey Semi-Detached
2.	LOT 16840	Taman Pelangi	3,757	06/2/2006	500,000	109.93	Double Storey Semi-Detached
3.	PTD 19019	Taman Pelangi	3,185	29/8/2006	450,000	112.40	Double Storey Semi-Detached
4.	PTD 15548	Taman Pelangi	3,716	06/4/2006	465,000	99.23	Double Storey Semi-Detached

[12] The 'Comparison of Valuation' method is also employed in the plaintiff's valuation report in determining the market value of the land. The estimate value of the land was derived from comparing the values of other similar properties that were sold recently and those that are currently offered for sale in the vicinity. According to the plaintiff's valuation report double-storey semi-detached houses within the vicinity were transacted at the price range between RM440,000 per unit to RM485,000 per unit during the year 2005 and 2006. The plaintiff's valuation report opined that the present market value of the land at RM420,000 and the forced sale value at RM340,000. It is also useful to set out below the sales evidence contained in the plaintiff's valuation report:

SALES EVIDENCE

EVIDENCE 1

Lot No	PTD 10564	Land Area	469.61 sq mtr 5,050.00 sq ft
Location	Township and District of Johor Bahru 205, Jalan Dato Suleiman Taman Century, 80250 Johor Bahru Johor Darul Ta'zim	Trans. Price	470,000.00

A	Type	Double-Storey Semi-Detached House	Date of Trans	23-Feb-06
	Tenure	Freehold	Analysis Transferor Transferee Source	— Phan Chib Chan Lee Hsien Ming JPPH
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C	EVIDENCE 3			
	Lot No	15381	Land Area	473.70 sq mtr 5,100.00 sq ft
D	Location	Township and District of Johor Bahru 209, Jalan Dato Suleiman Taman Century, 80250 Johor Bahru Johor Darul Ta'zim	Trans. Price	485,000.00
	Type	Double-Storey Semi-Detached House	Date of Trans.	27-Apr-05
E	Tenure	Freehold	Analysis Transferor Transferee Source	Roblin Height Sdn Bhd Danie Pratsedjarjono JPPH
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FINDINGS OF THE COURT

- G** [13] The land is located in Taman Century, Johor Bahru. Taman Century is an established housing estate comprising residential and commercial properties. Access to the land from Johor Bahru city centre is via Jalan Tebrau followed by Jalan Dato Suleiman. Properties in the immediate vicinity
- H** include similar double-storey semi-detached houses, single-storey semi-detached houses, single-storey terrace houses, double-storey shophouses, single-storey shophouses and double-storey terrace houses.
- I** [14] All the four sales comparables adopted in the defendant's valuation report relate to double-storey semi-detached houses. The first sales comparable was transacted on 14 November 2003 at the price of RM580,000. The remaining three sales comparables were all transacted in 2006 at the prices at RM500,000, RM450,000 and RM465,000 respectively. However, it is relevant to note that all these three sales comparables relate to

properties located in Taman Pelangi. Taman Pelangi is also another established housing estate. It is not within the locality or vicinity of Taman Century. In fact, Taman Century and Taman Pelangi are separated by the Tebrau Highway. Access to Taman Pelangi from Johor Bahru city centre is via Jalan Tebrau followed Jalan Serampang. In addition, immediately adjacent to the Tebrau Highway on Taman Pelangi side is Taman Tebrau Jaya, another established housing estate. Taman Pelangi is located behind Taman Tebrau Jaya. In the premises Taman Pelangi is neither adjacent to nor contiguous to Taman Century.

[15] The three sales comparables adopted in the plaintiff's valuation report also relate to double-storey semi-detached houses. In this instance, however, all the three sales comparable are located in Taman Century. The first sales comparable was transacted at RM470,000 on 23 February 2006. The second and third sales comparable were transacted in 2005 at RM440,000 and RM485,000 respectively. Aside from this, it is also noted that of the three sales comparables two are also located along Jalan Dato Suleiman. More revealing is the fact that the land areas of these three sales comparables are larger than that of the land. The land area of the land is 4,191.5 square feet. In comparison, the land area for the three sales comparables is 5,050 square feet, 4,980 square feet and 5,100 square feet respectively.

[16] For the foregoing reasons the plaintiff's valuation report is preferred because it satisfies the criteria stated in *NKM Properties Sdn Bhd*. In addition the plaintiff's valuation report appears to have taken into consideration all the relevant factors enumerated by the Supreme Court in *Ng Tiou Hong*. The estimate of the market value of the land contained in the plaintiff's valuation report was derived at after adjustments were made to the comparable properties to reflect the market value of the property. The adjustments were made after a study of the respective characteristics, merits and demerits of each comparable property. In the premises, it is the court's finding that in the particular circumstances of this case the SAR was correct in determining the estimated market value of the land at RM420,000. Accordingly, the defendant's application is dismissed with costs.

Application dismissed with costs.

Reported by Chew Phye Ken

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